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Noor Ismahanum Mohd Ismail v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–39–01 OF 2016
TENGKU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
6 MARCH 2018

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Criminal Law — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Section 56(1) — Public prosecutor applied to forfeit monies in bank accounts seized on ground a money-laundering offence had been committed — Court's duty when determining such application — Principles applicable — Whether illegal deposit-taking was a money-laundering offence — Whether 'balance of probabilities' test applied in deciding whether application for forfeiture should be allowed — Whether prosecution only had to show prima facie case whereupon evidential burden shifted to claimant to show seized assets should not be forfeited — Whether court had to be satisfied that every single cent of the monies seized was tainted by a money-laundering offence before it could issue a forfeiture order — Evidence Act 1950 s 103

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The respondent had applied to the High Court under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUA') for an order to forfeit monies belonging to the appellant in two bank accounts ('the impugned monies') that were seized by Bank Negara enforcement officers on the ground they were the proceeds of a money-laundering offence under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA'), the predecessor to the AMLATFPUA. The impugned monies were allegedly deposits the appellant had received in an illegal deposit-taking scheme. The taking of such deposits constituted an offence under s 25(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA'), which, in turn, was an offence of money-laundering under s 4(1)(a) of the AMLATFA. In resisting the respondent's forfeiture application, the appellant claimed that the deposits she received were from investors in a legitimate gold-trading business that she was carrying on at the time and not for any unlawful activity. The judicial commissioner ('the JC') of the High Court granted the forfeiture order after finding, on balance of probabilities, that the impugned monies were 'the proceeds of an unlawful activity', namely, illegal deposit-taking in contravention of s 25(1) of the BAFIA. In the instant appeal, the appellant argued that the JC's decision was wrong because: (a) not all of the monies in the two bank accounts were connected to the illegal deposit-taking; (b) the JC had

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wrongly relied on the appellant's convictions on two offences — one, under s 25(1) of the BAFIA and the other under s 4(1) of the AMLATFA — in coming to his decision; and (c) the JC had relied on hearsay evidence to determine the identity and status of the impugned monies.

Held, dismissing the appeal and affirming the JC's decision:

(1) What the appellant omitted to say in her affidavit opposing the respondent's application for forfeiture was that she had no valid licence to accept deposits, which was an offence under s 25(1) of the BAFIA. It would have been easy for her to produce the licence if indeed she had one, yet she chose not to. It therefore had to be taken that she had none. The s 25(1) offence was a predicate offence under s 137 of the Financial Services Act 2013 as listed in the Second Schedule to the AMLATFA. Being a 'serious offence', illegal deposit-taking constituted an offence of money-laundering under s 4(1)(a) of the AMLATFA as it involved the proceeds of an 'unlawful activity' (see paras 12 & 27).

(2) There was no reason to disagree with the findings of the JC which were supported by evidence. An appellate court would not interfere willy-nilly with findings of fact made by the lower court. It would only interfere if the findings were so plainly wrong that a miscarriage of justice had been occasioned (see para 31).

(3) The court could not accede to the appellant's argument that in order for the monies in the two bank accounts to be forfeited, the JC had to satisfy himself that every single cent of the monies was the proceeds of illegal deposit-taking. Once the public prosecutor — as was done in this case — had produced prima facie proof that the monies in the accounts were the proceeds of illegal deposit-taking, the burden shifted to the appellant, by virtue of s 103 of the Evidence Act 1950, to either show that she had a valid licence to accept the deposits or that all or any part of the monies in the bank accounts were not the proceeds of illegal deposit-taking. To hold otherwise would be to place an unreasonable burden on the respondent. Enforcement of the AMLATEPUA would come to a standstill as money launderers would mix legal money with illegal money to beat the daylights out of the law. In the present case, the JC had firmly found on the evidence before him that the appellant had not discharged her burden (see paras 33–34 & 36–38).

(4) It was not wrong for the JC to have relied on the two convictions of the appellant in a separate case in making the order of forfeiture. This was allowed by s 76(1) of the AMLATEPUA as the convictions were relevant to the issue of whether the appellant had committed the offences under s 25(1) of the BAFIA and s 4(1) of the AMLATFA. Even if s 76(1) was not applicable, there was enough material before the JC to make the forfeiture order (see para 41).

(5) The appellant's argument about hearsay was never raised in the High Court and, in any event, was not fatal as the respondent's application was not only based on the statements of four investors but also on documents that the Bank Negara investigation officers had seized from CIMB Bank and Malayan Bank. The respondent's application gave the appellant sufficient particulars of the properties sought to be forfeited and the reasons for the application. The fact that the appellant was able to give a detailed explanation in answer to the respondent's application showed that she was not prejudiced in any way (see paras 42–44).

[Bahasa Malaysia summary

Responden telah memohon kepada Mahkamah Inggi di bawah s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('AMLATFPUA') untuk perintah untuk membatalkan wang milik perayu dalam dua akaun bank ('wang yang dipersoalkan') yang telah dirampas oleh pegawai penguatkuasa Bank Negara atas alasan ia adalah hasil sesuatu kesalahan pengubahan wang haram di bawah Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLATFA'), pendahulu kepada AMLATFPUA. Wang yang dipersoalkan itu dikatakan deposit yang diterima oleh perayu dalam satu ski pengambilan deposit haram. Pengambilan deposit tersebut merupakan satu kesalahan di bawah s 25(1) Akta Institusi-Institusi Perbankan dan Kewangan 1989 ('BAFIA'), yang seterusnya, adalah kesalahan pengubahan wang haram di bawah s 4(1)(a) AMLATFA. Dalam menentang permohonan pelucuthakan responden, perayu mendakwa bahawa deposit yang diterimanya adalah dari pelabur dalam perniagaan perdagangan emas secara sah yang dijalankan olehnya pada masa itu dan bukan aktiviti yang menyalahi undang-undang. Pesuruhjaya kehakiman ('PK') Mahkamah Tinggi membenarkan perintah pelucuthakan setelah mendapati, atas imbangan kebarangkalian, bahawa wang yang dipersoalkan itu adalah 'hasil daripada aktiviti yang menyalahi undang-undang', iaitu pengambilan deposit haram melanggar s 25(1) BAFIA. Dalam rayuan ini, perayu berhujah bahawa keputusan PK adalah salah kerana: (a) tidak semua wang dalam kedua-dua akaun bank boleh dikaitkan dengan pengambilan deposit secara haram; (b) PK telah terkhilaf kerana bergantung kepada sabitan perayu terhadap dua kesalahan — satu, di bawah s 25(1) BAFIA dan satu lagi di bawah s 4(1) AMLATFA — dalam membuat keputusannya; dan (c) PK telah bergantung kepada keterangan dengar cakap untuk menentukan identiti dan status wang yang dipersoalkan.

Diputuskan, secara sebulat suara menolak rayuan dan mengesahkan keputusan PK:

(1) Apa yang perayu tertinggal untuk mengatakan dalam afidavitnya membantah permohonan responden bagi pelucuthakan adalah bahawa dia tidak mempunyai lesen yang sah untuk menerima deposit itu, yang

merupakan kesalahan di bawah s 25(1) BAFIA. Adalah mudah baginya mengemukakan lesen jika memang dia mempunyai satu, tetapi dia tidak memilih begitu. Oleh itu, perlu dianggap bahawa dia tidak mempunyai apa-apa. Kesalahan s 25(1) adalah kesalahan jenayah di bawah s 137 Akta Perkhidmatan Kewangan 2013 yang disenaraikan dalam Jadual Kedua kepada AMLATFA. Sebagai 'kesalahan serius', pengambilan deposit haram merupakan kesalahan pengubahan wang haram di bawah s 4(1)(a) AMLATFA kerana ia melibatkan hasil daripada 'aktiviti yang menyalahi undang-undang' (lihat perenggan 12 & 27).

(2) Tidak ada sebab untuk tidak bersetuju dengan penemuan PK yang disokong dengan keterangan. Mahkamah rayuan tidak akan campur tangan dengan penemuan fakta yang dibuat oleh mahkamah bawahan. Ia hanya akan campur tangan jika penemuan begitu jelas salah sehingga menyebabkan kegagalan keadilan berlaku (lihat perenggan 31).

(3) Mahkamah tidak boleh menyetujui hujah perayu bahawa agar wang dalam kedua-dua akaun bank itu dilucutkan, PK perlu berpuas hati dengan dirinya bahawa setiap satu sen daripada wang itu adalah hasil pengambilan deposit haram. Sebaik sahaja pendakwa raya — seperti yang dilakukan dalam kes ini — telah mengemukakan bukti prima facie bahawa wang dalam akaun adalah hasil pengambilan deposit haram, beban itu berpindah kepada perayu, menurut s 103 Akta Keterangan 1950, sama ada menunjukkan bahawa dia mempunyai lesen yang sah untuk menerima deposit atau bahawa semua atau mana-mana bahagian wang dalam akaun bank bukanlah hasil pengambilan deposit haram. Untuk memutuskan sebaliknya akan meletakkan beban yang tidak munasabah terhadap responden. Penguatkuasaan AMLATEPUA akan terhenti kerana pencucian wang akan mencampurkan wang sah dengan wang haram untuk mengalahkan undang-undang. Dalam kes ini, PK telah mendapati keterangan yang kukuh di hadapannya bahawa perayu tidak melepaskan bebannya (lihat perenggan 33–34 & 36–38).

(4) Tidak salah bagi PK untuk bergantung kepada kedua-dua sabitan perayu dalam kes berasingan dalam membuat perintah pelucuthakan. Ini dibenarkan oleh s 76(1) AMLATEPUA kerana sabitan-sabitan itu adalah berkaitan dengan isu sama ada perayu telah melakukan kesalahan-kesalahan di bawah s 25(1) BAFIA dan s 4(1) AMLATFA. Walaupun s 76(1) tidak terpakai, terdapat bahan yang cukup di hadapan PK untuk membuat perintah pelucuthakan (lihat perenggan 41).

(5) Hujah perayu mengenai dengar cakap tidak pernah dibangkitkan di Mahkamah Tinggi dan, dalam apa keadaan, tidak memudaratkan kerana permohonan responden bukan hanya berdasarkan kenyataan empat pelabur tetapi juga pada dokumen yang dirampas oleh pegawai penyiasat Bank Negara daripada CIMB Bank dan Malayan Bank. Permohonan responden memberikan perayu butir-butir yang mencukupi tentang

hartanah yang ingin dirampas dan alasan untuk permohonan itu. Hakikat bahawa perayu dapat memberikan penjelasan terperinci sebagai jawapan kepada permohonan responden menunjukkan bahawa dia tidak diprasangka dengan cara apapun (lihat perenggan 42–44).]

Cases referred to

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 4 MLRA 226, CA (refd)
Toh Whye Teck v The Happy World Ltd [1953] 1 MLJ 171 (folld)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), (1)(a), 32, 56, 56(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), (2)(a), (2)(a)(i), (2)(a)(ii), (2)(a)(iii), (2)(a)(iv), (4), 61, 70(1), 76, 76(1), Second Schedule
Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013) s 25(1)
Evidence Act 1950 s 103
Federal Constitution art 13
Financial Services Act 2013 s 137
Interpretation Acts 1948 and 1967 s 35(2)

Appeal from: Criminal Application No BKI-44–1/1 of 2015 (High Court, Kota Kinabalu)

Jamadi bin Saleh (Farah Saira bt Abd Razak with him) (Adnan Puteh & Saleh) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] In the High Court at Kota Kinabalu, Sabah, the public prosecutor by notice of motion dated 7 January 2015 applied for an order of forfeiture in respect of two properties which Bank Negara enforcement officers had seized but in respect of which there was no prosecution nor conviction for a money laundering offence under s 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') or a terrorism financing offence. The application was opposed by the appellant.

[2] The AMLATFA is the predecessor to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATEPUA'). By operation of s 35(2) of the Interpretation Acts 1948 and

1967, references in the AMLATEPUA to the AMLATFA are to be construed as references to the AMLATEPUA.

[3] The notice of motion was supported by the affidavit of a deputy public prosecutor and the affidavits of Bank Negara investigation officers and was in the following terms:

> Bahawa Pendakwa Raya di bawah kuasa-kuasa yang diberi oleh subseksyen 56(1) Akta Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 (Akta 613) dibaca bersama Seksyen 376 Kanun Tatacara Jenayah (Akta 593) telah berpuas hati bahawa harta-harta alih yang disita oleh Pegawai Penyiasat Bank Negara Malaysia pada 10.01.2014 sebagaimana tersebut di atas adalah hasil suatu kesalahan di bawah subseksyen 4(1)(a) Akta Pencegahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001.

[4] The seized properties were:

(a) money amounting to RM2,111,256.20 and any additional amount thereof in current account No 14290008397053 in the CIMB Bank Bhd, Seri Petaling Branch belonging to the appellant; and

(b) money amounting to RM815,934.49 and any additional amount thereof in current account No 560193057354 (a company account under the name of Worldwide Far East Bhd) in Malayan Banking Bhd Lintas Square Kota Kinabalu Branch belonging to the appellant and one Yong Thain Vun. Both were signatories to the account.

[5] The application was made under s 56(1) of the AMLATEPUA, which provides as follows:

> 56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of a High Court for an order of forfeiture of that property if he is satisfied that such property is —
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> (a) the subject-matter or evidence relating to the commission of such offence;
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> (b) terrorist property;
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> (c) the proceeds of an unlawful activity; or
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> (d) the instrumentalities of an offence.

[6] Section 61 is not relevant for the purposes of this appeal, nor was it raised as an issue by the appellant. Therefore we shall not touch on it. As stated in the notice of motion, the public prosecutor's application was grounded on the fact

that the monies in the two bank accounts were the proceeds of money laundering, an offence under s 4(1)(a) of the AMLATFA. Section 4(1) of the AMLATFA reads:

> 4 Offence of money laundering
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> (1) Any person who —
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> (a) engages in, or attempts to engage in; or
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> (b) abets the commission of,
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> money laundering, commits an offence and shall, on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

[7] 'Money laundering' is defined by s 3(1) to mean an act of a person who:

> (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
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> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
>
> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,
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> where —
>
> (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
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> (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

[8] So, any person who engages in a transaction that involves 'proceeds of any unlawful activity' commits the offence of money laundering. As to what 'proceeds of an unlawful activity' means, it has been given the following definition by s 3(1):

> any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity.

[9] 'Unlawful activity' means:

> any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence.

[10] 'Serious offence' on the other hand is defined to mean:

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences.

[11] Key to the whole issue is the meaning ascribed to the words 'unlawful activity'. It is any activity that is 'related to a serious offence'. In the present case, the appellant was alleged to have accepted deposits without a valid licence (illegal deposit taking), which is an offence under s 25(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA').

[12] Such offence is a predicate offence under s 137 of the Financial Services Act 2013 as listed in the Second Schedule to the AMLATFA. Being a 'serious offence', illegal deposit taking therefore constitutes an offence of money laundering under s 4(1)(a) of the AMLATFA as it involves the proceeds of an 'unlawful activity'.

[13] Going by the plain language of s 56(1) of the AMLATEPUA, there is no requirement that a conviction under s 4(1)(a) of the AMLATFA or a terrorism financing offence must first be obtained before the public prosecutor could apply for forfeiture. What is required is for the public prosecutor to satisfy himself that the seized property falls under para (a) or (b) or (c) or (d) of s 56(1).

[14] The duty of a High Court judge upon receiving such application by the public prosecutor is prescribed by s 56(2), as follows:

> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
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> (a) that the property is —
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> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
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> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
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> (iv) the instrumentalities of an offence; and
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> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[15] The judge's primary concern in an application under s 56(1) is with the legal status of the property, not the guilt or otherwise of any person under s 4(1)(a) of the AMLATFA. He must order for forfeiture if the property falls under para (i) or (ii) or (iii) or (iv) of sub-s (2)(a).

[16] In the context of the present case, what the learned JC had to determine was whether the property was 'the proceeds of an unlawful activity' within the meaning of para (a)(iii) of s 56(2) and not whether any person had been convicted or acquitted of an offence under s 4(1)(a) of the AMLATFA although the fact of such conviction or acquittal was relevant under s 76.

[17] In determining whether the property is 'the proceeds of an unlawful activity', the standard of proof to be applied by the judge is the civil standard of proof, ie proof on the balance of probabilities, as stipulated by ss 56(4) and 70(1). This standard of proof must not be mistaken for proof beyond reasonable doubt, which is the heavier standard of proof that the public prosecutor is required to discharge in order to bring home a criminal charge against any person, such as a charge under s 4(1)(a) of the AMLATFA.

[18] As to the question when does a person discharge his civil standard of proof, Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 explained:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged but if the probabilities are equal, it is not.

[19] Thus, if the judge in an application under s 56(1) finds it to be more probable than not that the property is derived from a transaction that involves 'the proceeds of an unlawful activity', that will be sufficient for him to make an order of forfeiture under s 56(2). There is no need for him to be satisfied 'beyond any reasonable doubt' that the property is derived from an 'unlawful activity'.

[20] To recapitulate, 'unlawful activity' means 'any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence' and 'proceeds of an unlawful activity' means 'any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity'. Illegal deposit taking is a 'serious offence' by definition and is therefore an 'unlawful activity' for the purposes of s 56(2)(a)(iii) of the AMLATEPUA.

[21] These twists and turns in legislative acrobatics strains the tongue but what it means is that if any property is derived from any unlawful activity (of which illegal deposit taking is one such activity), it must be forfeited, irrespective of whether any person has been convicted or otherwise of the offence of money laundering under s 4(1)(a) of the AMLATFA.

[22] The facts giving rise to the public prosecutor's application are as follows. Four investors in an illegal deposit-taking scheme had given statements to Bank Negara investigation officers under s 32 of the AMLATFA to the effect that

they had either invested monies for the illegal deposit-taking scheme by depositing the monies into the two bank accounts, or had received profits from the scheme. Cheques and transaction slips were exhibited in their statements.

[23] In respect of monies in the Malayan Bank account held under the joint names of the appellant and Yong Thain Vun, it was undisputed that the appellant had pleaded guilty to and had been convicted of two offences, one under s 25(1) of the BAFIA and another under section 4(1) of the AMLATFA. This fact was confirmed by Yong Thain Vun in his statement under s 32 of the AMLATFA.

[24] Evidence of the appellant's convictions for these two offences was admitted pursuant to s 76 of the AMLATEPUA, which provides:

> (1) For the purposes of any proceedings under this Act, the fact that a person has been convicted or acquitted of an offence by or before any court in Malaysia or by a foreign court shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed or did not commit that offence, whether or not he is a party to the proceedings, and where he was convicted whether he was so convicted upon plea of guilt or otherwise.
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> (2) The court shall accept the conviction referred to in subsection (1) as conclusive unless —
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> (a) it is subject to review or appeal that has not yet been determined;
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> (b) it has been quashed or set aside; or
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> (c) the court is of the view that it is contrary to the interests of justice or the public interest to accept the conviction as conclusive.
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> (3) A person proved to have been convicted of an offence under this section shall be taken to have committed the act and to have possessed the state of mind, if any, which at law constitute that offence.
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> (4) Any conviction or acquittal admissible under this section may be proved —
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> (a) in the case of a conviction or acquittal before a court in Malaysia, by a certificate of conviction or acquittal, signed by the Registrar of that court; or
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> (b) in the case of a conviction or acquittal before a foreign court, by a certificate or certified official record of proceedings issued by that foreign court and duly authenticated by the official seal of a Minister of that foreign State,
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> giving the substance and effect of the charge and of the conviction or acquittal.

[25] The appellant's case in answer to the public prosecutor's notice of

motion was that some of the transactions involving her CIMB Bank account were carried out without her knowledge and that the monies in both the CIMB and Malayan Bank accounts were derived from legitimate sources and were not the proceeds of any unlawful activity. According to her, she was carrying on a legitimate gold trading business. This was what she said in her affidavit in opposition to the public prosecutor's notice of motion:

> As First Respondent in this case, I build my career as a businesswoman and my company established in the line of multinationals business such as Manufacturing, Construction, Education, Film and Documentary Producer, Event Management, International Consultant for Development of Pariaman, Indonesia, Family Consultant, Transportation etc. The Second Respondent is the Branch Manager (Kota Kinabalu) of my company. The name of the company is Worldwide Far East Bhd and established since 28.12.2010. The object to this company established are:
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> i. To carry on the business as weavers or otherwise manufacturers, buyers, sellers, importers, exporters and dealers of silk, art silk, synthetic, woolen and cotton fabrics and other fibrous products including dressing and furnishing materials, uniforms, readymade garments.
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> ii. To carry on, all or any in Malaysia or in any part of the world, the business of general merchants, traders, suppliers, importers, stores, storekeepers, removers, packers, brokers, distributors, manufacturers, manufacturers' representatives, commission agent, insurance, managing financial and general agents, investors, franchisors, carriers ship owners and or in any other capacity and dealers in and to buy, prepare, manufacture, tender marketable, sell, barter, exchange, pledge, charge, make advances on and otherwise deal in or with or turn to account by wholesale or retail goods, education materials, event management, general merchandise, and other commodities of all kinds and description.
>
> iii. To carry out on any form of business whatsoever, trade or undertaking whether as principals, agents, sub-agents or consignees and to deal in any form of produce matter or things.
>
> As First Respondent, I had obtained a licence from Dewan Bandaraya Kota Kinabalu (DBKK) to operate business in Gold Trading. And I had obtained a letter from Polis Diraja Malaysia (PDRM) and Bank Negara Malaysia (BNM) regarding business of Gold Trading. At all material time, the licenced DBKK is under the DBKK control and two letters from PDRM and BNM is under their control which means that the business movement could only be done with the permission from them.
>
> As First Respondent in this case, I also done make a Press Conference on 08.10.2012 to show that my business is legal business and run with the permission and licenced from DBKK, PDRM and BNM.
>
> I as First Respondent is in the business of trading in gold (the goods). Between the Month of September 2013, Mohd Norazman Bin Mohd Jaya (Refer as First Buyer) and Abdullah B. Lebai Abas (Refer as Second Buyer) had purchased the goods from me on 27.09.2013. Refer to the licence, I had obtained a licence from DBKK to

operate a gold trading established under Ordinan Perlesenan Perdagangan 1948 (Ordinan No.16 Tahun 1948) and at that time, the licence still valid until 31.12.2013.

[26] In her affidavit affirmed on 28 September 2015, the appellant had also averred as follows:

> 24. As First Respondent in this serious matter, I'm successfully proved that the monies in both accounts are comes from legal business and I had obtained a licence from Dewan Bandaraya Kota Kinabalu to operate business in gold trading. No matter what, this licence still valid until 31.12.2013 at the time both of the buyers bought the goods. And I had obtained a letter from Polis DiRaja Malaysia (PDRM) and Bank Negara Malaysia (BNM) regarding the business of Gold Trading. At all material time, the licenced DBKK is under the DBKK control and two letter from PDRM and BNM is under their control which means that the business movement could only be done with the permission from them. Refer to the licence, I had obtained a licence from DBKK to operate a gold trading established under Ordinan Perlesenan Perdagangan 1948 (Ordinan No.16 Tahun 1948) and at that time, the licensed still valid until 31.12.2013.

[27] What the appellant omitted to say in the above averments is that she had no valid licence to accept deposits, which is an offence under s 25(1) of the BAFIA. It would have been easy for her to produce the licence if indeed she possessed one, yet she chose not to. It must therefore be taken that she had none.

[28] What the appellant did in this case was to write to Bank Negara to seek approval to trade in gold, to which Bank Negara vide para 2 of its letter dated 11 April 2011 responded as follows:

> 2. Kami ingin memaklumkan bahawa aktiviti membeli atau menjual emas bukanlah di bawah bidang kuasa Bank Negara Malaysia. Sehubungan dengan itu tiada lessen khas atau kebenaran untuk jual beli emas diperlukan daripada Bank. Berdasarkan kepada pindaan terhadap Akta Kawalan Pertukaran 1953 bertarikh 15 Mei 2007, mana-mana individu di Malaysia bebas untuk membeli, meminjam, menjual dan mengeksport emas.

[29] At the conclusion of the proceedings, the learned JC was satisfied that the monies from the two bank accounts were 'the proceeds of an unlawful activity', ie illegal deposit taking in contravention of s 25(1) of the BAFIA and that the question of there being a purchaser in good faith for valuable consideration of the properties did not arise.

[30] The learned JC rejected the appellant's claim that the monies were not the proceeds of an illegal deposit taking activity. He was satisfied that the elements of s 56(2)(a)(iii) of the AMLATEPUA had been established.

Accordingly, he allowed the public prosecutor's application and ordered the two properties to be forfeited. We reproduce below the learned JC's findings, in his own words:

> Thirdly, the first respondent contends that some of the transactions on the CIMB account were done without her knowledge (the café renovation). I have no difficulty dismissing this contention, firstly because the account was in her personal name, and secondly because there is absolutely no proof whatsoever that the transactions were done without her knowledge.
>
> Finally, the first respondent has also contended that the monies in both the CIMB account and in the Malayan Banking's account were derived from legitimate legal sources and not illegal. This contention too suffers from lack of proof. It is a mere assertion, backed by no proof whatsoever.
>
> The first respondent contends that her business was legitimate gold trading business. She said that there was a licence issued by the DBKK. She also produced two letters — from Bank Negara and the police. The licence from DBKK is for gold trading. But from the statements of the investors (encl 1), it was very evidence that there was no gold that was being traded at all. It appears that the licence to trade in gold was nothing more than a front for the illegal deposit trading business.
>
> The letters from the police and Bank Negara do not take first respondent's case very far. They just show that the said agencies had no objection to the gold trading, which this 'business' was not at all.
>
> The fact that there was a press conference held by the respondent, implying that the business was carried out openly, does not carry the first respondent's case anywhere.
>
> In the result, the first respondent's challenge to this application fails.

[31] We found no reason to disagree with the learned JC as his findings were supported by the evidence. This is not a case where there was no evidence or no sufficient evidence to support the findings. It is trite principle that an appellate court does not interfere willy-nilly with findings of fact made by the lower court. The appellate court will only interfere if the findings are so plainly wrong that a miscarriage of justice had thereby been occasioned.

[32] Before us, learned counsel for the appellant attacked the learned JC's decision on four fronts, namely:

(a) the learned JC merely assumed that all the monies in the two bank accounts were illegal deposits;

(b) the learned JC was wrong in forfeiting all monies in the two bank accounts because only a small part of the monies was tainted with illegal investment;

(c) the learned JC erred in law in relying on the conviction of the appellant in a separate case in making the order of forfeiture; and

(d) the learned JC relied on hearsay evidence to determine the identity and status of the monies in the bank accounts.

[33] What the argument under grounds (a) and (b) amounted to was that before the monies in the two bank accounts could be forfeited, the learned JC must satisfy himself that every single sen of the monies was the proceeds of illegal deposit taking. This was how learned counsel articulated his argument:

> The learned JC did not consider whether the monies in the two bank accounts were *ALL* proceeds from 'illegal deposit taking' under section 25 BAFIA, before applying the law under section 56 AMLATEPUA. In other words, the learned JC did not apply the requirements under section 25 BAFIA to determine whether ALL of the monies in the CIMB account and/or the MAYBANK account fall under the category of 'illegal deposit taking' as prescribed under the said section 25 BAFIA read together with the definition of 'deposit' under section 2 BAFIA.
>
> Section 56 AMLATEPUA refers to the 'forfeiture of property' which in this case, refers to EACH AND EVERY monies in the said bank accounts. The Learned JC must comply with the requirements under section 56 to establish whether the 'property' to be forfeited i.e ALL of the monies in the disputed bank accounts, were proceeds from 'unlawful activity' which is 'illegal deposit taking' under section 25 BAFIA.
>
> Section 56 AMLATEPUA, DOES NOT provide that ALL moneys in a bank account must be forfeited if PART of it are proceeds from illegal deposit taking; if it is so, such will be unconstitutional under Article 13 of the Federal Constitution:

[34] We were unable to accede to the argument. In our view, once the public prosecutor produced prima facie proof that the monies in the two bank accounts were the proceeds of illegal deposit taking, the burden shifted to the claimant to show to the contrary by virtue of s 103 of the Evidence Act 1950 ('the Evidence Act') which provides:

> 103 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[35] In this connection, what Whitton J said in *Toh Whye Teck v The Happy World Ltd* [1953] 1 MLJ 171 when dealing with s 104 of the Evidence Ordinance (in pari materia with s 103 of the Evidence Act) is relevant. This is what the learned judge said:

> The question then arises on whom does the burden lie to show what sums would come within the section; and what payments are served by this provision relating to Municipal services. Mr Lee Kuan Yew has argued with great ability that some evidence at least should have been produced by the plaintiff as to the payments made for the Municipal services. If that evidence was forthcoming he would concede that the burden is then shifted to the defence. This argument is not to be

dismissed lightly, but on reflection I consider it is sufficient for the plaintiff, if, as in this case, he establishes prima facie that the rents received by the tenant exceeded in the aggregate 75% of the rent paid to himself.

I would express the view that it is not only a question of s 107 of the Evidence Ordinance which has application here, but I think s 104 also has application. It reads, 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person'.

To sum up my conclusions, it seems to me that the landlord fulfils his responsibility if he shows prima facie that the rent paid to the tenant falls within the section. If he does that, then I think the burden shifts to the defendant to show that he is covered by the provision regarding payment for Municipal services. To hold otherwise, it seems to me, would be an unreasonable burden on the landlord, quite apart from the provisions of the Evidence Ordinance on the matter.

[36] Applying the principle to the facts of the present case, the public prosecutor discharged his burden by establishing prima facie that the monies in the two bank accounts were 'the proceeds of an unlawful activity', ie illegal deposit taking as the appellant had no valid licence to accept the deposits.

[37] Once that was established by the public prosecutor, the burden shifted to the appellant to either show that she had a valid licence to accept the deposits or alternatively that all or any part of the monies in the bank accounts were not the proceeds of illegal deposit taking. To hold otherwise would be to place an unreasonable burden on the public prosecutor. Enforcement of the AMLATEPUA would come to a standstill as money launderers would mix legal money with illegal money to beat the daylights out of the law.

[38] Whether or not the appellant succeeded in discharging her burden of proof was entirely for the learned JC to determine, having regard to the evidence before him. In the present case, the learned JC's firm finding was that the appellant failed to do so. It was therefore futile for the appellant to argue that not all but only some of the monies in the two bank accounts were the proceeds of illegal deposit taking.

[39] The appellant cited the decision of this court in *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 4 MLRA 226 where it was held that in an application under s 56 of the AMLATEPUA, a forfeiture order can only be made if an offence under s 4(1)(a) of the AMLATFA has been proved to have been committed.

[40] We failed to see how this case could be of assistance to the appellant as the monies deposited in the two bank accounts had been found by the learned JC to be the proceeds of illegal deposit taking, ie 'the proceeds of an unlawful

activity' within the meaning of s 56(2)(a)(iii) of the AMLATEPUA. In other words, it had been proved that the monies in the two bank accounts were 'more probable than not' the proceeds of an unlawful activity. Having made this finding of fact, the learned JC had no option but 'shall' make an order of forfeiture, which he did.

[41] As for ground (c), there was nothing wrong in our view for the learned JC to rely on the two convictions of the appellant in a separate case in making the order of forfeiture. This was allowed by s 76(1) of the AMLATEPUA as the convictions were relevant to the issue of whether she committed the offences under s 25(1) of the BAFIA and under s 4(1) of the AMLATFA. Even if counsel was right that s 76(1) does not apply to the facts of the case, there was in any event enough material before the learned JC for him to make the forfeiture order.

[42] As for ground (d), we do not find this to be fatal to the public prosecutor's case as the application was not only based on the statements of the four investors but also on documents that the Bank Negara investigation officers had seized from CIMB Bank and Malayan Bank.

[43] Further, the notice of motion had given the appellant sufficient particulars of the properties sought to be forfeited and the reasons for the application for forfeiture. The fact that the appellant could give a detailed explanation in answer to the notice of motion shows that she was not prejudiced in any way.

[44] The issue raised in ground (d) was also never raised in the High Court. The issues raised in the court below were:

(a) whether there was a delay on the part of the applicant in filing the application for forfeiture of the properties;

(b) whether the question of the property having been obtained from unlawful activity did not arise;

(c) whether the terms of the goods in the licence were in breach of the law;

(d) whether the typing error 'can dismiss this application by application by applicant to forfeiture the property'; and

(e) whether the property was forfeited in violation of art 13 of the Federal Constitution.

[45] It was for all the reasons aforesaid that we unanimously dismissed the appellant's appeal and affirmed the decision of the learned JC.

Appeal dismissed and the JC's decision affirmed.

Reported by Ashok Kumar